UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

DEBRA J. FRUCHTMAN
and SETH D.L. RIGBERG
Debtor(s)

Case No. 00-15270

DEBRA J. FRUCHTMAN
and SETH D.L. FRUCHTMAN
Plaintiff(s)

-against-

Adversary No. 00-90288

CALIFORNIA SCHOOL OF PROFESSIONAL PSYCHOLOGY, CITIBANK STUDENT LOAN CORPORATION , SALLIE MAE SERVICING CORPORATION, STUDENT LOAN SERVICING CENTER, and UNITED STATES DEPARTMENT OF EDUCATION
Defendant(s)

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

The current matter before the court is the United States Department of Health and Human

Services' ("Defendant") motion to dismiss an adversary complaint brought by Debra J. Fruchtman and Seth D.L. Rigberg ("Plaintiffs") seeking discharge of certain student loans pursuant to 11 U.S.C. § 523(a)(8).[1] The loans in question are Health Education Assistance Loans ("HEAL") that are governed by 42 U.S.C. § 492 *et seq*.[2] The court has jurisdiction via 28 U.S.C. §§ 157(a), 157(b)(1), 157(b)(2)(I) and 1334(b). For the reasons that follow, the Defendant's motion is granted.

FACTS[3]

1. Plaintiff Fruchtman's HEAL loan became due on March 20, 1997.

2. One forbearance period extended the "start date" of the loan, for purposes of calculating the seven year wait period, to June 19, 1997.

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[1] Section 523(a)(8) reads as follows:

> (8) for an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship, or stipend.
> Unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

[2] Subsection f part (g) of 42 U.S.C. § 292 is entitled "Conditions for discharge of debt in bankruptcy" and states, in relevant part:

> Notwithstanding any other provision of Federal or State law, a debt that is a loan insured under the authority of this subpart may be released by a discharge in bankruptcy under any chapter of title 11, Unites States Code, only if such discharge is granted -
> (1) after the expiration of the seven-year period beginning on the first date when repayment of such loan is required, exclusive of any period after such date in which the obligation to pay installments on the loan is suspended; ...

[3] The Plaintiffs have not provided any information regarding the dates of the loans in question. However, because their main contention seems to be that 42 U.S.C. § 292f(g)(1)'s requirement of a seven year waiting period for a HEAL discharge was, in effect, superceded by an amendment to 11 U.S.C. § 523(a)(8) eliminating any reference to a waiting period for a non-HEAL loan, the court accepts Defendant's loan dates as accurate. Additionally, Plaintiffs have not disputed any of the Defendant's dates as offered.

3. Plaintiff Fruchtman filed a Chapter 7 on September 29, 2000.

4. The instant adversary proceeding was commenced on December 6, 2000.

5. Plaintiff Rigberg's HEAL loan became due on October 31, 1993.

6. Due to an intern/residency program and certain forbearance periods, the "start date" of the loan, for purposes of calculating the seven year wait period, was extended to August 20, 1997.

7. Plaintiff Rigberg filed a Chapter 7 on September 29, 2000.

8. The instant adversary proceeding was commenced on December 6, 2000.

ARGUMENTS

Defendant's motion to dismiss is premised on the viability of 42 U.S.C. § 292f(g)(1)'s requirement of a seven year waiting period. Defendant argues that because that period has not expired, any request for a discharge is premature.

Plaintiffs' counsel responds by stating in a cover letter to a submission dated November 6, 2001 that:

> It is the debtor's position that the amendments to 42 U.S.C. § 292f(g) under the Health Professions Education Partnership Act of 1998, specifically the inclusion of the phrase "Notwithstanding any other provision of Federal or State Law...," were likely intended to be in deference to the October, 1998 amendments to U.S.C. § 523(a)(8)."

The amendment in question removed the seven year waiting period requirement before educational loans made, insured or guaranteed by a governmental unit became eligible for a discharge in bankruptcy. Therefore, the sole grounds for discharge of student loans pursuant to § 523(a)(8) is now undue hardship. Thus, the court understands Plaintiffs' argument to be that there is no seven year waiting period for any student loan, HEAL loans included.

DISCUSSION

Section 523(a)(8) governs the dischargeability of student loans with the exception of certain health education loans. The most well known of these are HEAL loans. COLLIER ON BANKRUPTCY § 523.14(4)(15th ed.1996). HEAL loan dischargeability is controlled by 42 U.S.C. § 292f(g). *In re Rice*, 78 F.3d 1144 (6th Cir. 1996). That section imposes a three part test including a finding that the nondischargeability of the HEAL loan would be unconscionable. Courts analyzing this section have concluded that in employing the term "unconscionable," Congress intended to adopt the ordinary usage of the term as "excessive, exorbitant," "lying outside the limits of what is reasonable or acceptable," "shockingly unfair, harsh, or unjust" or "outrageous." *See, e.g., In re Rice, supra* at 1149; *Matthews v. Pineo*, 19 F. 3d 121, 124 (3d Cir. 1994). Thus, the three part test to discharge a HEAL loan is much harder to achieve than undue hardship under § 523(a)(8).

It is very difficult to understand plaintiffs' statutory construction argument. It appears they are stating that because the seven year waiting period was removed from the lower standard of § 523(a)(8), the more difficult standard of § 292f(g) was necessarily modified, removing the seven year waiting period for HEAL loans by implication. They assert this despite the face of clear congressional intent to elevate and insulate HEAL loans from discharge absent extraordinary factual circumstances. The argument advanced by the plaintiffs simply does not logically follow.

This court concludes that the amendment to § 523(a)(8) removing that seven year waiting period had no effect on the continued existence of the three part test in § 292f(g) including that section's seven year waiting period. It is, of course, within Congress' authority to revisit the strict test mandated for HEAL type loans. However, unless and until that is done, the discharge

of this type of student obligation will continue to be one of the most difficult debtor goals to achieve under Title 11.

Defendant makes a further argument that Plaintiffs do not meet the second part of the three prong test, i.e., unconscionability. However, the court need not address that argument because of the failure to meet § 292f(g)(1)'s seven year mandate.

The defendant's motion to dismiss the adversary insomuch as it applies to the United States is granted.

It is so ORDERED.

Dated: April 24, 2002

Hon. Robert E. Littlefield, Jr.
U.S. Bankruptcy Judge